

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

**1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036**

(202) 955-9800

FACSIMILE
(202) 955-9792
www.kelleydrye.com

DIRECT LINE: (202) 887-1248
EMAIL: rbuntrock@kelleydrye.com

September 16, 2003

VIA ELECTRONIC FILING

Marlene Dortch, Secretary,
Federal Communications Commission
445 12th Street SW
Room TWB-204
Washington, DC 20554

Re: Ex Parte Notification: WC Docket 03-167, Application By SBC Communications Inc. For Authorization Under Section 271 of The Communications Act to Provide In-Region, Inter LATA Service in the States of Illinois, Ohio, Indiana and Wisconsin

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, Mpower Communications, Inc. ("Mpower") submits this written *ex parte* presentation in the above-captioned proceeding. The purpose of this filing is to update the record regarding SBC's failure to provide accurate wholesale bills to Mpower in the former Ameritech region, in compliance with checklist item 2 of the Section 271 competitive checklist. As detailed below, it is clear that SBC is either incapable of issuing accurate wholesale bills to Mpower, as required by checklist item 2, or alternatively, that SBC is intentionally misbilling Mpower and other carriers in an effort to dupe unwitting carriers into paying fraudulently issued bills.

Mpower, headquartered in Pittsford, New York, is a facilities-based competitive local exchange carrier ("CLEC") that has provided bundled packages of local, long distance, and enhanced services to small and medium sized business customers in the states comprising the former Ameritech region. Beginning in April 2002, through August 2003, Mpower filed billing disputes, pursuant to the provisions of its interconnection agreement with SBC, in connection with trip charges improperly assessed by SBC on approximately 14,000 trouble tickets. Despite the fact that it has billed Mpower, to date, SBC has not been able to provide any evidence that Mpower was the party that opened the tickets, that the troubles were on Mpower's side of the network, or that the circuits associated with the trouble tickets were even associated with loops

Marlene Dortch
September 16, 2003
Page Two

leased from SBC by Mpower. Moreover, some of the trip charges billed to Mpower by SBC have already been settled between Mpower and SBC pursuant to the terms of a settlement agreement between the parties.¹ Nonetheless, as of August 30, 2003, approximately \$1.2 million associated with SBC's improper billing of trip charges to Mpower in the Ameritech region remains in dispute.

SBC either has a serious issue with the accuracy of its wholesale bills in the Ameritech territory, or alternatively, SBC is engaged in the practice of intentionally incorrectly billing carriers for maintenance and repair work caused by trouble on the SBC side of the network. In any event, SBC knows it has substantially misbilled Mpower for trip charges in the Ameritech territory which are currently at issue. In order to investigate and resolve the issues associated with the improper trip charges, the parties undertook carrier-to-carrier negotiations. In an effort to more manageably investigate the disputes, Mpower and SBC agreed to examine data associated with the incorrect charges for 2 months of the 17 months at issue and apply the results of the investigation to the entire 17 month period.²

In the 2 months examined, June and July 2002, SBC billed Mpower for trip charges in 684 instances. To further narrow the disputes and reduce the amount of data that needed be examined, SBC and Mpower mutually agreed to a set of "ground rules" for investigation of the 684 trip charges for the agreed upon 2 months, which are attached hereto as Attachment 1. Pursuant to the ground rules, the parties agreed to parse data for 75 of the 684 trouble tickets. Further, Mpower agreed to provide SBC with 75 numbers ranging from 2 to 684 to correlate to the "line item (Trip Ticket dispute) on the master dispute spreadsheet" compiled by SBC.³ The carriers further agreed that "the results from the 75 tickets will be applied across the entire [sic] based to resolve the Mid-West Trip Charge dispute."⁴ In other words, the carriers agreed to extrapolate the results of the audit of the 75 tickets to all of the disputed trip charges for the 17 month period.⁵

Initially, upon examining the 75 tickets identified by Mpower, SBC's Local Service Center ("LSC") immediately concluded, with little or no research, that the disputed trip charges were properly assessed by SBC and that Mpower was responsible for payment. Mpower countered the LSC's assertion with evidence refuting the LSC's findings. The evidence presented by Mpower to the LSC and the SBC account team substantiated that 70 out of the 75 trouble tickets examined were, in fact, billed incorrectly and that Mpower deserved a billing

¹ See *In re Mpower Holding Corp. et. al*, Chapter 11 Case No. 02-11046, Order Approving Confidential Stipulation and Order Regarding Debtors' Objection to Claims of SBC Affiliates (Bankr. D. Del. Feb. 10, 2003).

² Mpower and SBC agreed to review data for the months of June and July 2002 because both Mpower and SBC agreed that those months provide an accurate and honest snapshot of SBC's inaccurate billing.

³ See Attachment 1

⁴ *Id.*

⁵ *Id.*

Marlene Dortch
September 16, 2003
Page Three

credit. **SBC concurred with this finding.** In other words, SBC billed Mpower incorrectly 93% of the time for trip charges.

However, once the results of the audit were substantiated, and SBC came to appreciate the gravity of their billing problems as it pertained to these charges, SBC inexplicably sought to change the ground rules to which they had previously agreed in order to deprive Mpower of the full credit it deserves (i.e. 93% of an invoice of \$1.2 million). That is, once SBC discovered that the results of the audit favor Mpower, it now wants to re-write the rules and start game over. One might expect such brazenly childish behavior on an elementary school playground, but not from the executives of a multi-billion dollar company. Accordingly, SBC has effectively demonstrated that not only is it incapable of rendering accurate wholesale bills to Mpower and other CLECs in the SBC Midwest region, but also that SBC's word cannot be relied upon by carriers in dispute resolution negotiations. It appears that SBC is unwilling to negotiate in good faith and adhere to the agreement it made with Mpower in order to amicably resolve the disputes arising from the improperly billed trip charges.

In light of Mpower's experience here, the Commission should not rely upon any promises by SBC to fix the plethora of problems with SBC's wholesale billing systems, at some future point in time. Rather, the Commission should demand that SBC immediately address the issues identified by the Department of Justice, and other carriers in this proceeding, before granting this application for 271 authority.⁶ After all, if SBC fails to live up to its promises to carriers *before* being granted 271 authority, it will certainly have no incentive to do so afterward. The Commission should, in no uncertain terms, insist that SBC resolve the "serious questions remain[ing] concerning the accuracy of SBC's wholesale billing," which precluded the Department of Justice from concluding that SBC has adequately addressed the issues associated with SBC's wholesale billing system.⁷ Clearly, SBC has not complied with checklist item 2.

Checklist item 2 requires that SBC provide non-discriminatory access to network elements in accordance with section 251(c)(3) and 252(d)(1). In the *Verizon Pennsylvania Order* the Commission concluded that nondiscriminatory access to network elements under checklist item 2 includes the requirement that a BOC demonstrate that it can produce readable, auditable and accurate wholesale bills.⁸ The Commission held:

⁶ Evaluation of the U.S. Department of Justice, *In re: Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, the Ohio Bell Telephone Company, Wisconsin Bell, Inc. Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin*, WC Docket 03-167 (Aug. 26, 2003) ("DOJ Evaluation").

⁷ DOJ Evaluation, 14.

⁸ See *Verizon Pennsylvania Order*, Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶22-23 (2001). ("Verizon Pennsylvania Order").

Marlene Dortch
September 16, 2003
Page Four

Inaccurate or untimely wholesale bills can impede a competitive LEC's ability to compete in many ways. First, a competitive LEC must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a competitive LEC must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, competitive LECs must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, competitive LECs may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an incumbent LEC. Accurate and timely wholesale bills in both retail and BOS BDT format thus represent a crucial component of OSS.⁹

To demonstrate compliance with an item contained in the section 271 competitive checklist, including checklist item 2, SBC must prove that "it currently furnishes, or is ready to furnish, the checklist item on a nondiscriminatory basis."¹⁰ Clearly, that is not the case, as no material change has been made to SBC's billing systems since the DOJ Evaluation was filed on August 26.

To the extent that the erroneous bills Mpower has received from SBC are not the result of error, they are the result of a knowing effort by SBC to misbill CLECs. In fact, the record of this proceeding demonstrates that SBC has consistently misbilled CLECs.¹¹ This knowing and intentional misbilling bogs CLECs down in protracted "negotiations" with SBC in order to obtain the proper credits, costing CLECs hundreds of thousands of dollars per year, as the Commission recognized in the *Verizon Pennsylvania Order*. In Mpower's experience, to the extent that the "negotiations" do not result in a favorable outcome for SBC, they will take their ball and go home. Moreover, SBC generally insists that CLECs escrow the often large amounts of money at issue before SBC will investigate a billing dispute. Therefore, by intentionally misbilling CLECs SBC can tie up vast sums of CLEC operating capital and hobble the CLEC's ability to effectively compete in the marketplace.

⁹ *Verizon Pennsylvania Order*, ¶ 23 (citations omitted).

¹⁰ See *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3973-74 at ¶ 52 (1999). ("Bell Atlantic NY Order"), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

¹¹ See Z-Tel comments, 11.

Marlene Dortch
September 16, 2003
Page Five

As demonstrated above, SBC does not comply with the wholesale billing requirements of competitive checklist item 2. Accordingly, the Commission should not approve the Application until such time as SBC has demonstrated affirmatively that it has corrected its systems and abandoned its policy of unlawfully billing CLECs as described herein. In accordance with Rule 1.1206 of the Commission's rules, one electronic copy of this notice and the attached materials are being provided for inclusion in the above referenced docket.

Respectfully submitted,



Ross A. Buntrock

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Dan Gonzalez
Lisa Zaina
William Maher
Jeffrey Carlisle
Michelle Carey
Thomas Navin
Brent Olson
John Stanley
Jeremy Miller
John Rogovin
Pamela Arluk
Douglas Galbi
Deena Shetler
Jennifer McKee
Irshad Abdal-Haqq
Layla Seirafi-Najar (DOJ)

Attachment A

Buntrock, Ross A.

From: Sarem, Scott [ssarem@mpowercom.com]
Sent: Monday, September 15, 2003 10:53 AM
To: Buntrock, Ross A.
Subject: FW: Ground Rules

Importance: High

-----Original Message-----

From: Sarem, Scott
Sent: Thursday, September 04, 2003 1:54 PM
To: Heatter, Rick; Wilson, Pat; Sarem, Scott
Subject: FW: Ground Rules
Importance: High

Please save this as evidence of the trip charge dispute agreement.

Scott

-----Original Message-----

From: O'SULLIVAN, PAUL A (PTSS) [mailto:po2652@sbc.com]
Sent: Thursday, August 21, 2003 2:36 PM
To: 'Sarem, Scott'
Cc: JONES, JENNIFER (PB); COOPER, LARRY B (SBC-MSI)
Subject: RE: Ground Rules

Scott,

I concur with your upgrades.

Paul O'Sullivan
Director - CLEC Account Management
Industry Markets
415-545-0967 office
877-318-9592 pager
415-541-0665 fax

This e-mail and any files transmitted with it are the property of SBC Communications and/or its affiliates, are confidential, and are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please notify the sender at 415-545-0967 and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited.

-----Original Message-----

From: Sarem, Scott [mailto:ssarem@mpowercom.com]
Sent: Thursday, August 21, 2003 2:21 PM
To: O'SULLIVAN, PAUL A (PTSS); Sarem, Scott
Cc: JONES, JENNIFER (PB); COOPER, LARRY B (SBC-MSI)

Subject: RE: Ground Rules

I propose the following for the bullet point regarding Mpower not being able to find the ticket.

If Mpower cannot find a circuit id associated with the trouble ticket, then SBC must provide information that demonstrates that the circuit id belongs to Mpower. Once SBC can demonstrate the circuit id belongs to MPower it must provide evidence that the trouble was on Mpower's side of the network. If SBC provides conclusive evidence that the circuit belongs to Mpower and that the trouble is on Mpower's side, the ticket will go in SBC's favor.

If trouble is shown to be conclusively on the Mpower side of the network, the ticket will go in SBC's favor.

If trouble is conclusively shown to be on AIT's network, the ticket will go in Mpower's favor.

If you agree to this change we have consensus.

Scott

-----Original Message-----

From: O'SULLIVAN, PAUL A (PTSS) [mailto:po2652@sbc.com]
Sent: Thursday, August 21, 2003 2:12 PM
To: 'Sarem, Scott'
Cc: JONES, JENNIFER (PB); COOPER, LARRY B (SBC-MSI)
Subject: FW: Ground Rules

Scott,

I've made the upgrades that we just discussed to bullet 5 and 7. Let me know if you agree.

Paul O'Sullivan
Director - CLEC Account Management
Industry Markets
415-545-0967 office
877-318-9592 pager
415-541-0665 fax

This e-mail and any files transmitted with it are the property of SBC Communications and/or its affiliates, are confidential, and are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please notify the sender at 415-545-0967 and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited.

> -----Original Message-----

> From: O'SULLIVAN, PAUL A (PTSS)
> Sent: Wednesday, August 20, 2003 3:14 PM
> To: 'Sarem, Scott'
> Cc: JONES, JENNIFER (PB); COOPER, LARRY B (SBC-MSI)
> Subject: Ground Rules

>

> Scott,

>

> Please let me know your thoughts on these ground rules for conducting

> the review of the Mid-west Trip Charges.

>

> * Sample size is 75 tickets

> * MPower will provide SBC with 75 numbers, ranging between 2 - 684.

> Those numbers will correlate to the line item (Trip Ticket dispute) on

> the master dispute spreadsheet that SBC has compiled. Those 75 line

> items represent the sample that both companies will review.

> * The results from the 75 tickets will be applied across the entire

> based to resolve the Mid-West Trip Charge dispute.

> * If SBC can not find the information on a ticket that supports their

> position, the ticket will go in MPower's favor.

> * If MPower can not find the information on a ticket that supports

> their position, SBC will valid that the circuit belongs to MPower. If

> MPower still can not find any information the ticket will go in SBC's

> favor. IF SBC finds that the circiut does not belong to MPower that

> ticket will go in MPower's favor.

> * If both parties disagree on the findings, then those tickets in

> question would go through the ADR process for resolution.

> * Both parties agree to have their research complete within 5

> business days of receiving the data.

>

> Paul O'Sullivan

> Director - CLEC Account Management

> Industry Markets

> 415-545-0967 office

> 877-318-9592 pager

> 415-541-0665 fax

>

> This e-mail and any files transmitted with it are the property of SBC

> Communications and/or its affiliates, are confidential, and are

> intended solely for the use of the individual or entity to whom this

> e-mail is addressed. If you are not one of the named recipients or

> otherwise have reason to believe that you have received this message

> in error, please notify the sender at 415-545-0967 and delete this

> message immediately from your computer. Any other use, retention,

> dissemination, forwarding, printing or copying of this e-mail is

> strictly prohibited.

>

>

CONFIDENTIAL

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

DATE 01-11-2007 BY 60322 UCBAW